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No.

IN THE

Supreme Court of the United States

October Term, 1984

KAISER ALUMINUM & CHEMICAL CORPORATION and KAISER ALUMINUM & CHEMICAL SALES, INC.,
Petitioners,

v.

JOSEPH A. BONJORNO, GEORGE M. KERR, and BARBARA F. CLISBY,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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QUESTIONS PRESENTED

1. Does Section 2 of the Sherman Act impose on a vertically integrated producer a duty to price its raw material and finished products so as to avoid a "price squeeze" on a non-integrated finished product fabricator, even though the integrated producer has no monopoly over the raw material, but rather is only one of several substantial suppliers?

2. Can Section 2 liability for a "price squeeze" be based on "price leadership" in the raw material market where, during the period of the alleged squeeze: (a) the non-integrated fabricator purchased all of its raw material from a competitor of the integrated firm; and (b) the only record evidence of actual prices showed that the competitor did not follow the integrated firm's prices?

RULE 28.1 STATEMENT

This statement is submitted pursuant to Rule 28.1 of the Rules of the Supreme Court. Until it was merged into Petitioner Kaiser Aluminum & Chemical Corporation, Petitioner Kaiser Aluminum & Chemical Sales, Inc., was a wholly owned subsidiary of Petitioner, Kaiser Aluminum & Chemical Corporation. Neither of the Petitioners has any subsidiaries or affiliates which have any publicly held securities, except Hindustan Aluminium Corporation, Ltd.

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Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

This petition for a writ of certiorari, filed on behalf of Kaiser Aluminum & Chemical Corporation and its wholly owned subsidiary Kaiser Aluminum & Chemical Sales, Inc. (collectively "Kaiser"), presents vitally important antitrust issues that divided the Court of Appeals for the Third Circuit. As Circuit Judge Adams stated in dissenting from the denial of Kaiser's petition for rehearing, the decision below represents a "significant extension" of the "price squeeze" theory of antitrust liability for monopolization under Section 2 of the Sherman Act.

OPINIONS BELOW.

The Opinion and Judgment of the Court of Appeals dated December 27, 1984, reported at 752 F.2d 802, is reproduced in Appendices "B" and "C" to this Petition. The Opinions of the United States District Court for the Eastern District of Pennsylvania (Shapiro, J.), reported

at 518 F. Supp. 102 and 559 F. Supp. 922, are reproduced in Appendices "D" and "E", respectively. The Opinion of the Court of Appeals in a prior appeal decided on May 24, 1978, and reported at 579 F.2d 20, is reproduced in Appendix "F".

JURISDICTION

The judgment of the Court of Appeals (A-31-32), affirming a treble-damage award of $9,567,939 was entered on December 27, 1984. Kaiser's timely petition for rehearing and suggestion of rehearing in banc was denied by Order dated March 8, 1985, with Circuit Judges Adams and Becker dissenting (Appendix A). The jurisdiction of this Court is invoked under 28 U.S.C. §1254-(1).

STATUTE INVOLVED.

The only remaining claim in this case arises under Section 2 of the Sherman Act, 15 U.S.C. §2, which provides in pertinent part:

> "Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony . . . ."

STATEMENT OF THE CASE.

The Court of Appeals' affirmance of the jury verdicts in this case rests on a ruling that Kaiser, an integrated producer of aluminum culvert pipe, could have been found to have imposed an unlawful "price squeeze" on an independent pipe producer, even though (a) Kaiser competed with other major suppliers and thus did not have unilateral monopoly power over the price of aluminum coil, the raw material from which culvert pipe is

made, (b) the independent culvert pipe producer purchased all of its raw material from a Kaiser competitor, and (c) the only record evidence of actual prices showed that the competitor from whom the independent purchased its raw material did not follow Kaiser's prices.

This private antitrust action involves competition in the mid-Atlantic States in culvert and drainage pipe ("culvert pipe"), a product used to convey water underground from one point to another. Culvert pipe is made of a variety of materials, including concrete, steel, aluminum, plastic, asbestos cement, and vitrified clay, and is sold to federal, state, and local highway departments, counties, municipalities, and private contractors engaged in real estate development, which use the pipe in the construction of roadside drainage and storm sewers.

Culvert pipe was and still is manufactured primarily from concrete and steel. In the late 1950's, aluminum was introduced by Kaiser as a culvert material. Thereafter, Kaiser mounted efforts to secure acceptance of aluminum by engineers and writers of highway construction specifications as an alternate culvert material to concrete and steel.

1. *The Parties.*

A. Columbia.

Respondents, the plaintiffs in this private antitrust suit, are the former shareholders of Columbia Metal Culvert Co., Inc. ("Columbia").[1] Columbia, a New Jersey fabricator of aluminum culvert pipe, began operations in 1960. Until 1971, Columbia purchased the aluminum coil it used to make culvert pipe primarily from Kaiser. In 1971, a dispute developed between Columbia and Kaiser concerning their supplier-customer relationship, and

1. This case was instituted in 1974 in the name of Columbia, but later continued in the name of respondents, Columbia's stockholders, after Columbia sold its business to Howmet Aluminum Company.

Columbia thereafter began to purchase its requirements from Reynolds Metals Company ("Reynolds"). By late 1973 Columbia had begun to purchase aluminum coil exclusively from Aluminum Company of America ("Alcoa"). During the entire period of 1971-1977, Columbia purchased its coil requirements from Reynolds and Alcoa—not from Kaiser.

In October, 1973, Columbia borrowed additional capital to make modifications to its pipe production facilities. At the same time a recession in the construction industry which continued in 1974 led to a general decline in demand for culvert pipe and made it difficult for Columbia to service its debt. Federal price controls in effect during the Nixon Administration kept aluminum coil prices at the same level from 1969 through 1973. Although demand for culvert pipe was low, the general demand for aluminum for other uses remained high. When price controls on aluminum coil were removed in early 1974, the price of aluminum coil rose sharply. Burdened with debt and suffering from cash-flow problems, Columbia began to decline to bid on most long-term supply contracts and its sales declined, aggravating its precarious financial condition. It suspended its manufacturing operations in 1975. Revived by an Economic Development Administration loan on June 1, 1977, it resumed manufacture of pipe for several months. Columbia sold its assets to Howmet Aluminum Company in 1978.

B. *Kaiser.*

The third largest domestic aluminum manufacturer, Kaiser accounts for only approximately 15 percent of domestic aluminum production capacity in an industry that was once monopolized by Alcoa, Kaiser's competitor. *See, United States* v. *Aluminum Co. of America*, 148 F.2d 416 (2d Cir. 1945) (L. Hand, J.). Like Alcoa, Reynolds and other domestic aluminum producers, Kai-

ser is vertically integrated and engages in most stages of aluminum production from mining of bauxite and refining to manufacture of aluminum semi-finished and finished products. Among the semi-finished products Kaiser produces is aluminum coil. Coil, in turn, is used not only in making culvert pipe, but is principally used for various finished aluminum products, including aluminum cans, residential siding, tubing and automotive and aircraft parts.

As noted above, Kaiser pioneered aluminum as a culvert material. It fabricates aluminum culvert pipe at a number of facilities throughout the United States and sells the product through independent distributors and its own sales force in competition with concrete, steel and aluminum pipe fabricators. Kaiser's larger competitors, Alcoa and Reynolds, have participated in the culvert pipe market only by selling aluminum coil to independent pipe fabricators. During the period from 1962 through 1974, Kaiser located a number of aluminum pipe machines in various parts of the United States, and by 1974 had facilities in nine locations, including New Castle, Delaware.[2]

The New Castle facility, located approximately fifty miles from Columbia's plant in Vineland, New Jersey, began operations in May of 1973, after Kaiser lost Columbia as a major customer. At about the same time, Kaiser appointed Kennedy Culvert & Supply Co., as a distributor of culvert pipe. Kennedy Culvert & Supply was owned by Robert A. Kennedy, who had been a salesman in Columbia's employ.

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2. New Castle is located within the Mid-Atlantic area, which was stipulated by the parties to constitute the relevant geographic market for culvert pipe. This area is bordered by Connecticut in the North, West Virginia to the West and Virginia to the South.

2. *The Proceedings Below.*

A. Columbia's Complaint.

Columbia's complaint, as supplemented in 1976, charged Kaiser, Mr. Kennedy and his company with violations of Sections 1 and 2 of the Sherman Act, as amended, 15 U.S.C. §§1 and 2, Section 3 of the Clayton Act, 15 U.S.C. §14, and Section 2(a) of the Robinson-Patman Act, 15 U.S.C. §13(a).[3] Columbia charged that Kaiser violated Sections 1 and 2 of the Sherman Act by engaging in a conspiracy with its wholly-owned subsidiary and with Kennedy to eliminate Columbia as a competitor, allegedly because Columbia refused to purchase all its aluminum supply from Kaiser.

Columbia relied on five acts that were said to prove the alleged antitrust violations, including its principal claim that beginning in January, 1974, Columbia was a victim of a "price squeeze," whereby the margin between aluminum coil prices and its finished culvert pipe prices was not sufficient to permit profitable sales.[4]

The only claim of violation that now remains is Columbia's assertion of liability under Section 2 of the Sherman Act for attempts to monopolize and monopolization.[5]

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3. Columbia's initial complaint was filed on January 14, 1974.

4. Columbia contended that the violation also consisted of allegations that in 1968, Kaiser persuaded Columbia to install a certain kind of pipe-making machine, called a Stamco spiral machine, which by 1973 required modification; that in 1971 Kaiser refused to deal with Columbia because Columbia had decided to switch its source of supply, in part, to Reynolds; that in May 1973, Kaiser located a pipe-making facility in New Castle, Delaware, within the stipulated relevant geographic market and close to Columbia's plant in Vineland, New Jersey; and that in May 1973, Kaiser appointed Kennedy, who had resigned as a Columbia salesman, as an independent distributor for its pipe.

5. All other claims have either been abandoned (price discrimination under the Robinson Patman Act), set aside (conspiracy under Sections 1 and 2 of the Sherman Act), or dismissed (exclusive dealing under Section 3 of the Clayton Act).

B. *The 1977 Trial.*

Trial of Columbia's claims began in April 1977. At the conclusion of Columbia's case, the district court granted defendants' motion for a directed verdict in their favor on all counts of the Complaint and entered judgment accordingly. The directed verdict was based largely on the trial court's finding that the evidence conclusively demonstrated that the relevant finished product market consisted of culvert pipe made from both steel and aluminum.

C. *The First Appeal.*

The Court of Appeals for the Third Circuit reversed, holding that there was sufficient evidence to permit a jury reasonably to infer that the relevant product market consisted only of pipe made from aluminum. With the finished product market so narrowly drawn,[6] it was possible, according to the Court, to conclude that Kaiser possessed as much as 80% of that market and that Kaiser had "unlawfully exercised" its monopoly power to Columbia's detriment. 579 F.2d 20 (3d Cir. 1978), *cert. denied*, 439 U.S. 876 (1978).[7]

D. *The Second Trial.*

The case was tried on remand in 1979. The centerpiece of Columbia's claim was that Kaiser deliberately

6. Kaiser does not urge the Third Circuit's erroneous market definition determination as a basis for review in this Court, except insofar as the artificially narrow market definition helps explain the occurrence of the alleged "price squeeze."

7. The Court of Appeals in this earlier appeal upheld the directed verdict as to Columbia's claim that Kaiser violated Section 3 of the Clayton Act. 15 U.S.C. §14. The Court concluded that Columbia had failed to adduce any evidence whatsoever of the relevant product market in which sheet and coil is sold. 579 F.2d at 36. In the absence of such evidence, a jury could not determine whether Kaiser's alleged "exclusive dealing" foreclosed Kaiser's competitors from a substantial part of the "market".

imposed an unlawful "price squeeze" on Columbia. According to Columbia, Kaiser imposed this "price squeeze" even though Kaiser was not selling Columbia aluminum coil, the raw material, and even though Kaiser's finished pipe prices were always above its own costs.

Because Kaiser was not Columbia's supplier of aluminum coil during the time period of this alleged "price squeeze," Columbia was obliged to contend that Kaiser somehow "controlled" the prices of the other aluminum producers, including Alcoa, which did supply Columbia with coil during the "squeeze". Columbia argued that by exercising "price leadership," Kaiser could control the margin between prices at two distinct and adjacent levels of production: (1) aluminum coil prices, and (2) by means of its large market share in aluminum pipe in this local geographic market, aluminum culvert pipe prices.

The jury was instructed that it could find Kaiser and its wholly owned subsidiary liable for a "price squeeze" as part of an unlawful "intra-enterprise conspiracy" in restraint of trade under Section 1 of the Sherman Act, and also as part of an unlawful "intra-enterprise conspiracy" to monopolize, attempt to monopolize, and actual monopolization under Section 2 of the Sherman Act. The jury returned a $5,445,000 treble-damage verdict in Columbia's favor under Sections 1 and 2 of the Sherman Act. (A-70-71). The district court denied Kaiser's motion for judgment n.o.v., but granted a new trial, primarily because of the inadequate and confusing nature of plaintiff's damage proofs. The trial judge limited the new trial to the issue of amount of damages. (A-72).

E. *The Limited Retrial on Damages.*

Under a novel, hybrid trial procedure which involved the district court's reading of a prepared summary of Columbia's liability contentions at the prior trial, and

Columbia's counsel's enlargement on these contentions in an opening statement to the jury, the second jury returned a treble-damage verdict of $9,567,939, *i.e.*, nearly twice the amount of the original verdict returned by the jury that had heard the liability evidence.[8] Observing that much of the apparent prejudice resulting to Kaiser was simply inherent in this unprecedented limited retrial procedure, the trial court denied Kaiser's motion for judgment n.o.v., except with respect to one component of the treble-damage judgment, which the court reduced to $4,651,560. (A- 116). Both sides appealed.

F. *The Second Appeal*

The Third Circuit upheld the first jury's finding of liability, and, reversing the district court, reinstated the second jury's $9,567,939 damage award. The Court rested its affirmance of the liability verdict on evidence purportedly sufficient to support the claims of individual attempt to monopolize and monopolization.[9] It first cited

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8. The district court acknowledged that the jury could not understand the evidence relating to the amount of damages without knowing the liability evidence. The district court stated that simply reading to the limited retrial jury the prior jury's answers to the special interrogatories on liability would have been insufficient, because that verdict did not identify what acts had occurred, which acts were unlawful, which acts had caused injury to Columbia, and what kind of injury they had caused. In spite of the acknowledged need to inform the jury of liability evidence for them to render a reasoned verdict on the issue of amount of damages, the district court held that the facts relating to liability and damages were not "interwoven" and that *Gasoline Products Co.* v. *Champlin Refining Co.*, 283 U.S. 494 (1931), did not apply. On appeal, Kaiser cited this ruling as an error, but the Court of Appeals affirmed. Judge Adams correctly cited the point as one basis for his vote to grant Kaiser's petition for rehearing.

9. The appeals from the district court's decisions were argued in September, 1983; but before the appeal was decided, this Court granted a petition for a writ of certiorari in *Copperweld Corp.* v. *Independence Tube Co.*,_____U.S. _____, 104 S.Ct. 2731 (1984). The Court of Appeals decided to await this Court's decision in *Cop-*

evidence allegedly establishing that Kaiser "attempted to control its competition" by refusing to deal with Columbia when Columbia switched a major part of its coil purchases to Reynolds and, thereafter, by locating a competing culvert pipe fabricating plant near Columbia. The Court then addressed Columbia's "most serious claim," namely, that (A-14)

> Kaiser deliberately raised the price of the raw materials to the same level as the price [Kaiser] charged for the finished pipe, thus making it impossible for Columbia to operate at a profit if it sold pipe competitively with Kaiser. The plaintiffs term this price condition a 'price squeeze.'

The Court recognized that Columbia's contention concerning Kaiser's control over the raw material prices was "problematic," and noted that Kaiser was not even the largest supplier of aluminum coil to independent culvert pipe fabricators.[10] (A-15). The Court also observed that Kaiser had not supplied Columbia with aluminum coil during the price-squeeze period. However, relying on, and extending the scope of, *United States v. Aluminum Co. of America*, 148 F.2d 416 (2d Cir. 1945), ("*Alcoa*") the Court upheld the Section 2 charge on the ground

NOTE 9 (*Continued*)
perweld. Notwithstanding this Court's opinion in *Copperweld*, the Court of Appeals sidestepped the jury's erroneous Sherman Act §§1 and 2 findings of "intra-enterprise conspiracy." The Court of Appeals did not reach the question whether *Copperweld* means that a parent corporation is also legally incapable of "conspiring" *to monopolize* with its wholly-owned subsidiary within the meaning of Section 2 of the Sherman Act, concluding that the jury finding of liability and the damage award "would be the same even if the jury had not been instructed that KACC and KACSI could be considered separate entities." (A-11). While Kaiser contended on Petition for Rehearing and still maintain that this holding was erroneous, review and reversal is unnecessary in light of the errors raised by the Questions Presented.

10. In fact, the record is clear that Kaiser was the third largest domestic aluminum coil producer, behind Alcoa and Reynolds.

that the evidence was sufficient to establish that Kaiser was the "price leader" and that the alleged price squeeze, induced indirectly by Kaiser's exercise of "price leadership," was "deliberate." (A-17-18).

In reaching this result, the Court brushed aside the only record evidence of actual coil prices charged by Kaiser and its two larger competitors, Alcoa and Reynolds. Columbia itself introduced into evidence in chart form each price change for aluminum coil by Alcoa, Reynolds and Kaiser during the alleged price-squeeze period beginning in 1974. That evidence demonstrated without contradiction that Alcoa, Columbia's coil supplier, never followed Kaiser's published price changes during the period of the alleged squeeze. Rather, Alcoa set coil prices and sold coil to Columbia at prices substantially below those published by Kaiser. Even Columbia's own expert witness was forced to agree that price leadership "would be difficult to establish from this chart alone." (Court of Appeals appendix, 699a).

The Court of Appeals denied Kaiser's petition for rehearing by Order dated March 8, 1985, with Circuit Judges Adams and Becker dissenting. Judge Adams, who had written the opinion for the Court of Appeals in the first appeal, expressed the view that the price squeeze holding represented a "substantial expansion" of Judge Hand's holding in *Alcoa* and because of its importance for antitrust policy was one that warranted examination by the Court in banc. (A-4).

REASONS FOR GRANTING THE WRIT

Kaiser respectfully submits that the Court should grant the writ to review the Third Circuit's "price squeeze" ruling, which represents a significant and unwarranted expansion of the *Alcoa* price squeeze doctrine, and threatens to have profoundly adverse

anticompetitive consequences.[11]

Extension of the *Alcoa* price-squeeze doctrine to cases in which an integrated firm lacks unilateral monopoly power in the raw material or "upstream" market, greatly expands the scope of the legal constraints on beneficial vertical integration, a feature of industrial organization that, *inter alia*, strengthens the competitive incentives for producers to promote existing finished products and to develop innovative new finished products.

Even if an extension of the *Alcoa* doctrine were deemed appropriate in certain circumstances, those circumstances would have to be carefully defined. In particular, it is of threshold importance that price-squeeze claims should not be upheld on the basis of alleged "price leadership" in the absence of proof that the integrated firm's upstream market competitors *in fact* followed that firm's prices; or, in any event, in the face of actual price data showing the contrary.

I. PRICE SQUEEZES.

In general terms, a "price squeeze" occurs whenever a firm which is required to purchase its raw material in the market is required by competitive conditions to sell its finished product at a price that is insufficient to cover its raw material costs, its fabrication costs and its selling expenses. The several kinds of "price squeezes" may be classified as follows:

(a) *Normal Operation of Market Forces*. Most price squeezes are wholly innocent and occur simply as a result of the normal operation of market forces. A typical case would be one where demand may increase for many finished products for which a raw material is sold, caus-

11. While the court committed other significant errors (*see e.g.*, footnotes 7 and 8 *supra*), the questions presented are of such importance and so decisive in this case that these other errors need not be addressed.

ing raw material producers to increase their prices. But if demand for a particular finished product has not increased, sellers of that product (including vertically integrated firms) will maintain the price for that finished product or raise it by less than the raw material price increase, thus narrowing the margin between raw material and finished product prices. These kinds of squeezes are more accurately termed "market-squeezes," and may occur whether or not any firm possesses monopoly power in the raw material market.

(b) *Inefficiency.* A non-integrated producer may be relatively inefficient: either its fabrication costs or its selling or overhead expenses may be so excessive that the margin between its cost for raw materials and its finished product price is insufficient to allow a profit. If a vertically integrated firm's costs of producing the finished product are less than those of independent fabricators, a competitive finished product price reflecting the lower costs will "squeeze" the independents.

(c) *Abuse of Monopoly Power in Raw Material Market.* Price squeezes may be "market" or "efficiency" squeezes even where a vertically integrated firm has monopoly power in a raw material market. However, such a firm might employ a price squeeze to gain a monopoly in finished product markets for the purpose of discouraging entry by forcing new entrants to come in at both the raw material and finished product levels.[12]

(d) *Predatory Pricing of Finished Product.* A vertically integrated producer may deliberately sell its finished product in competition with its non-integrated rival at a predatory price below its own costs. This is simply single-product predatory pricing, and can be dealt with by applying the usual predatory pricing rules. No such issue was raised in this case, because Columbia

12. Columbia conceded that Kaiser's position in the finished product market had been lawfully acquired. Consequently, it cannot contend that Kaiser imposed a squeeze for the purpose of gaining a monopoly in that market

conceded that Kaiser had consistently sold culvert pipe above its own costs.

Price squeezes are a frequently recurring economic phenomenon in basic industrial sectors of the economy, and have been especially prevalent in the aluminum, steel, petroleum, electric power, corn products refining, chemical, food packing and distribution, computer, copper, and paper industries.[13] The Court touched on the

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13. George A. Birrell, "The Integrated Company and the Price Squeeze Under the Sherman Act and Section 2(a) of the Clayton Act, As Amended," 32 Notre Dame Law. 5 (1956); Merton J. Peck, *Competition in the Aluminum Industry* 1945-1958 (Harvard Univ. Press 1961) at 72-82 ("The Price Squeeze Upon the Independent Fabricators"); Donald H. Wallace, *Market Control in the Aluminum Industry* (Harvard Univ. Press, 1937) at 379-395 ("The Ingot-Sheet Price Differential"); Robert Bork, "Vertical Integration and the Sherman Act: The Legal History of an Economic Misconception," 22 U. Chi. L. Rev. 157 (1954); 163-165; 179-180; 198-199; Simon H. Whitney, *Antitrust Policies: American Experience in Twenty Industries* (Twentieth Century Fund 1958) vol. 1, at 320; vol. 2 at 93, 398; Eugene Singer, *Antitrust Economics* (Prentice-Hall, Inc., 1968) at 212, 215-216, 217-220; Walter Adams, "Vertical Power, Dual Distribution and the Squeeze: A Case Study in Steel," 9 Antitrust Bull. 493 (1964); Senate Small Business Committee, "Monopolistic Practices and Small Business," March 31, 1952 at 53; U.S. Tariff Commission, Hearing, May 7, 1963, Transcript Pages 265-266; "Economic Memorandum by Walter Adams," submitted to U.S. Tariff Commission, May 7, 1963; Walter Adams, "The Steel Industry," in Adams ed., *The Structure of American Industry* (Macmillan Pub. Co. 5th ed., 1971) at 94; *Hearings Before the Joint Committee on the Economic Report*, 80th Cong., 2d Sess., 1948 at 14-15; M. A. Adelman, "Economic Aspects of the Bethlehem Opinion," 45 U. Va.L.Rev. 684 (1959); *United States* v. *Bethlehem Steel Corp.*, 168 F.Supp. 576 (S.D.N.Y. 1958); TNEC Monograph No. 39, "Control of the Petroleum Industry By Major Oil Companies," (1941) at 32 ("The Refinery 'Price Squeeze' "); TNEC Monograph No. 39-A, "Review and Criticism on Behalf of Standard Oil Co. (New Jersey) and Sun Oil Co. of Monograph No. 39 With Rejoinder By Monograph Author" (1941) at 42; Melvin G. deChazeau and Alfred E. Kahn, *Integration and Competition in the Petroleum Industry*, (Yale Univ. Press, 1959) at 221-229, 450-471; Richard B. Manke, "Competition in the Oil Industry," in Edward J.

problem in the electric power industry in *Federal Power Commission* v. *Conway Corp.*, 426 U.S. 271 (1976). But the leading decision on the price squeeze in the antitrust context is Judge Learned Hand's landmark opinion in *United States* v. *Aluminum Co. of America*, 148 F.2d 416 (2d Cir. 1945).

NOTE 13 *(Continued)*
Mitchell ed., *Vertical Integration In the Oil Industry* at 63-67; Wesley J. Liebeler, "Integration and Competition," in Mitchell, supra, at 30-32; J. McGee, "Price Discrimination and Competitive Effects," 23 U. Chi. L.Rev. 398 (1956); *see also, FTC v. Standard Oil Co. of Indiana*, Docket No. 4389. *See*, 41 FTC 263 (1945), *modified*, 43 FTC 56 (1946), *affirmed in part and modified in part*, 173 F.2d 210 (1949), *rev'd on other grounds*, 340 U.S. 231 (1951); *on remand*, 49 FTC 923 (1953), *vacated*, 1956 CCH Trade Cas. ¶68,332 (1956); A. Stuart Holmes, "First Generation Price Squeeze Policy at the FERC," 110 Pub. Util. Fort. 32 (1982); John E. Lopatka, "The Electric Utility Price Squeeze As An Antitrust Cause of Action," 31 UCLA L.Rev. 563 (1984); M. Gapinski, "The Applicability of Antitrust Laws To Price Squeezes in the Electric Utility Industry," 54 St. John's L.Rev. 103 (1979); *see also*, Federal Power Commission, Price Squeeze — procedural rules, Docket No. RM 79-79 (issued November 19, 1979); Federal Power Commission, Price Squeeze — substantive rules, Docket No. RM 79-80 (issued November 19, 1979); *Federal Power Commission* v. *Conway Corp.*, 426 U.S. 271 (1976); *City of Bethany* v. *FERC*, 727 F.2d 1131 (D.C. Cir 1984), *cert. denied*, 105 S.Ct. 293 (1984); *Cities of Batavia, et al.* v. *FERC*, 672 F.2d 64 (D.C. Cir., 1982); *City of Groton* v. *Connecticut Light & Power Co.*, 662 F.2d 921 (2d Cir., 1981); *Borough of Lansdale* v. *Philadelphia Electric Co.*, 692 F.2d 307 (3d Cir. 1982); *City of Mishakawa* v. *American Electric Power Co.*, 616 F.2d 976, 983-985 (7th Cir., 1980); *City of Kirkwood* v. *Union Electric Co.*, 671 F.2d 1173, 1176-1179 (8th Cir., 1982) and cases cited in footnote 8; *City of Chanute* v. *Kansas Gas & Electric Co.*, 1985-1 CCH Trade Cas. ¶66,399 (10th Cir. Opinion Filed February 5, 1985); G. E. Hale and Rosemary D. Hale, *Market Power: Size and Shape Under the Sherman Act* (Little, Brown & Co., 1958) at 205, 229; *United States* v. *American Cyanamid Co.*, 719 F.2d 558, 562, n.5 (2d Cir., 1983), *cert. denied*, 104 S.Ct. 1596 (1984); *United States* v. *Corn Products Refining Co.*, 234 Fed 964 (S.D.N.Y., 1916); *Dimmitt Agri Industries, Inc.* v. *C.P.C. Int., Inc.*, 679 F.2d 516 (5th Cir. 1982), *cert. denied*, 460 U.S. 1082 (1983); Adelman, "Integration and Antitrust Policy," 63 Harv. L.Rev. 27 (1949); *United States* v. *New York Great*

II. THE THIRD CIRCUIT'S DECISION IS A DANGEROUS AND UNWARRANTED EXTENSION OF THE *ALCOA* "PRICE SQUEEZE" DOCTRINE TO NON-MONOPOLY "PRICE LEADERSHIP."

A. *Alcoa* Held That Proof Of Monopoly Power In The Raw Material Is An Essential Element Of A Price Squeeze.

The Third Circuit's decision represents a substantial and unsound departure from existing antitrust "price squeeze" doctrine, as that doctrine was defined in Judge Hand's opinion in *Alcoa* in his discussion of Alcoa's "price squeeze" of independent aluminum sheet fabricators, who bought ingot from Alcoa and fabricated and sold aluminum sheet in competition with it. 148 F.2d at 436-38.[14] In *Alcoa*, the Government's price squeeze contention was "that 'Alcoa' consistently sold ingot at so high a price that the 'sheet rollers' who were forced to buy from it, could not pay the expenses of 'rolling' the 'sheet' and make a living profit out of the price at which 'Alcoa' itself sold 'sheet'." 148 F.2d at 437.

NOTE 13 *(Continued)*
A & P Tea Co., 67 *F.Supp. 626 (E.D. Ill. 1946), aff'd*, 173 F.2d 79 (7th Cir. 1949); *Greyhound Computer Corp.* v. *International Business Machines Corp.*, 559 F.2d 488 (9th Cir. 1977), *cert. denied*, 434 U.S. 1040 (1978) (treating the price squeeze issue under a different rubric); *Franklin Container Corp.* v. *International Paper Co.*, Civil Action No. 77-3204 (E.D. Pa.) (consent decrees protecting non-integrated corrugated container manufacturers from price squeeze by integrated firms).

14. Judge Hand's opinion in *Alcoa* has been accorded special precedential weight. The appeal came before the Court of Appeals for the Second Circuit by virtue of a special statute (now 28 U.S.C. 2109) because, by reason of disqualifications, this Court could not muster a quorum. Accordingly, this Court has said "[t]hat case was decided by the Circuit Court of Appeals under unique circumstances which add to its weight as a precedent," *American Tobacco Co.* v. *United States*, 328 U.S. 781, 811 (1946), and has treated it accordingly in later antitrust decisions.

Judge Hand found that, by reason of its status as the sole domestic producer of virgin ingot, and by its "*control over the ingot market*" (which the Court "reckoned at over ninety percent"), Alcoa had monopoly power with respect to the *aluminum ingot market* in the United States. Based on his finding of monopoly power in the ingot market, Judge Hand wrote (148 F.2d at 438):

> "That it was unlawful to set the price of 'sheet' so low and hold the price of ingot so high, seems to us unquestionable, provided, as we have held, that on this record the price of ingot must be regarded as higher than a 'fair price.' True, this was only a consequence of 'Alcoa's' control over the price of ingot. . . [b]ut it was at least an unlawful exercise of 'Alcoa's' power after it had been put on notice by the 'sheet rollers' complaints. . . . We hold that at least in 1932 it had become a wrong."

Judge Hand also expressly found that aluminum sheet fabricators "were *forced* to buy" this ingot from Alcoa. 148 F.2d at 437.

B. The Third Circuit's Decision Is A Substantial And Dangerous Expansion Of The *Alcoa* "Price Squeeze" Theory.

As Judge Adams recognized in his Statement Sur Petition for Rehearing,[15] the Third Circuit's decision in

15. Judge Adams stated (A-4):
"The substantial expansion of the 'price squeeze' theory of liability also merits attention. Kaiser has been found guilty of utilizing an unlawful price squeeze even though during the years in question plaintiff was purchasing its raw materials from Alcoa and Reynolds, rather than from the defendant. One essential element of a price squeeze is monopoly power in the raw material. See *United States* v. *Aluminum Company of America*, 148 F.2d 416 (2d Cir. 1945). Therefore, it appears to be a significant extension of the price squeeze doctrine to predicate antitrust liability on such a basis in a case in which the defendant is not

this case represents a "significant extension" of *Alcoa*. (A-4).

First, the decision below extends the doctrine to impose liability for a "price squeeze" on a company that was not supplying raw material to the independent fabricator allegedly injured by the "squeeze". Kaiser never sold aluminum coil to Columbia after April, 1971. It was not selling coil to Columbia during the period of the alleged pipe "price squeeze" in 1974. Columbia's supplier during the period of alleged squeeze was Alcoa.

Second, the decision below extends the doctrine to impose liability on a producer that did not have monopoly power in the defined raw material market of the "squeezed" independent. There was no proof that Kaiser possessed monopoly power in any relevant "raw material" market. In accepting a price squeeze contention under this relaxed legal standard, the Third Circuit ignored Columbia's failure of proof with respect to each aspect of the critical element of monopoly power in the raw material market. Under the *Alcoa* standard, however, Columbia had to prove that Kaiser possessed monopoly power in a relevant raw material market, just as the Government was required to prove and did prove that Alcoa held monopoly power in the aluminum ingot market.

C. Expansion of the "Price Squeeze" Rule Would Produce Substantial Adverse Competitive Effects.

There are strong antitrust policy reasons for not extending the *Alcoa* price-squeeze theory to non-monopoly cases. Because it tends to inhibit beneficial vertical integration, the *Alcoa* price-squeeze theory of Section 2 liability is itself questionable, even when applied to a monopolist that has integrated forward into a finished

NOTE 15 *(Continued)*

selling the raw material in question to the plaintiff and there is no evidence of any conspiracy between defendant and the other suppliers of the raw material."

product market.[16] Extending the price-squeeze theory to cases where a vertically integrated firm is only one of several producers in a concentrated raw material industry would greatly magnify those adverse economic effects.

In order to increase sales, producers of a raw material are competitively motivated to promote the expansion of existing finished product markets, and to develop new uses for their products, both entirely new finished products or finished products that compete with other materials. For a variety of reasons a producer of the raw material may wish to accomplish this objective by vertical integration.

Unlike the case of a raw material monopolist, the incentive for a non-monopolist to incur costs of expansion and innovation is curbed by the fact that competing raw material producers may be able to "free ride" on one producer's efforts. Vertical integration in that instance increases the benefits of such expansion and innovation. Vertical integration into production of a finished product may also be necessary or desirable because: (a) a sufficient number of independent fabricators of a new finished product cannot be found; (b) independent fabricators cannot be relied upon to exploit a finished product market; (c) vertical integration may insure that the finished product is competitively priced, leading to greater output of both the raw material and finished product; and (d) there are substantial vertical integration economies.

Vertical integration is, in fact, a principal way in which firms in a concentrated industry compete with one another. Vertical integration in basic industries often has highly desirable economic consequences. As this Court has observed, "Technological advances may easily require a basic industry plant to expand its processes into semi-finished or finished goods so as to produce desired

16. *See* 3 P. Areeda & D. Turner, *Antitrust Law* ¶729(c).

articles in greater volume and with less expense." *United States* v. *Columbia Steel Co.*, 334 U.S. 495, 526 (1948).

To make "price squeezes" subject to antitrust attack in the absence of a raw material monopoly would have the following effects, none of which are pro-competitive or promote consumer welfare. *First*, it would force a vertically integrated firm to incur losses by (a) raising its finished product price to the level sufficient to guarantee a "living profit" to the independent fabricators regardless of their efficiency or lack of it; (b) selling raw material to independent fabricators at prices below those obtainable by sale to other markets; or (c) shutting down its finished-product facilities. Such choices would not only harm the integrated firm but would distort resource allocation and harm consumers as well.

Second, facing the Hobson's choice between exposure to antitrust treble damages and adverse profit effects from partial vertical integration, raw material producers would be much less likely to vertically integrate. This tendency would produce adverse economic consequences whenever vertical integration would promote new or old uses most effectively, or otherwise intensify competition in either the raw material or finished product markets. By discouraging partial vertical integration, an extended price squeeze rule would reduce the rewards, and hence the incentives, for promotion of new and existing finished products, one of the principal avenues by which firms in concentrated industries compete to the benefit of consumers and the economy generally. A loss of invention and service has long been recognized as one of the costs of a rule of law that would limit vertical integration.[17]

The Court should grant the writ to limit this expansion of the conventional antitrust "price squeeze" doctrine. Moreover, as shown below, aspects of the Third

17. Peck, *Competition in the Aluminum Industry 1945-1958*, 126, 200 (1961).

Circuit's "price squeeze" holding cannot be squared with settled antitrust principles concerning definition of market power—an additional reason why the Court should review this multi-million dollar, treble-damage judgment.

III. THE THIRD CIRCUIT'S ECONOMICALLY UNSOUND AND LEGALLY UNSUPPORTED PRICE LEADERSHIP TEST DEMONSTRATES THE PROBLEMS THAT ARISE FROM AN UNWARRANTED EXTENSION OF *ALCOA*.

A. "Price Leadership" Alone Does Not Show Monopoly Power.

The Third Circuit's "price squeeze" holding extends *Alcoa* by equating "price leadership" with monopoly power. Since Columbia did not purchase its raw material from Kaiser during the "squeeze," Columbia was forced to demonstrate that Kaiser somehow "controlled" the raw material prices of Columbia's supplier. In expanding conventional "price squeeze" doctrine, the Third Circuit relaxed the burden of showing monopoly power and based its ruling instead primarily on evidence purporting to show Kaiser's "price leadership."

Price leadership is not synonymous with monopoly power. It falls far short of that power to control prices or exclude competitors which constitutes the classic definition of monopoly power. *See, Dimmit Agri Industries, Inc.* v. *CPC International, Inc.*, 679 F.2d 516, 530-31 (5th Cir. 1982), *cert. denied*, 460 U.S. 1082 (1983). To be sure, a dominant firm in an industry comprised of itself and a number of much smaller rivals may be able to control prices and in that sense be a "price leader." However, there are several reasons why an inference in the opposite direction, from price leadership to monopoly power, does not follow. Price leadership of the "dominant firm" type is not the only kind of price leadership. Price leadership may simply be "barometric," and such baro-

metric price leadership supports no inference of monopoly power.

> Unlike price leadership of the dominant firm type, there is no explanatory hypothesis which identifies the barometric price leader. In contrast to the dominant firm, *the barometric firm "commands adherence of rivals to his price only because, and to the extent that, his price reflects market conditions with tolerable promptness."* Hence, the reasons why a particular firm is the barometric firm must be found in the historical background of an industry and the institutional and other features which have shaped its development. (Emphasis added and footnote omitted).[18]

No sinister inference can be drawn from barometric price leadership:

> For the most part. . . the barometric price leader. . .*appears to do little more than set prices that would eventually be set by forces of competition.*[19] (Emphasis added)

The Court recognized this long ago in *United States* v. *International Harvester Co.*, 274 U.S. 693, 708 (1927), where it said that "the fact that competitors may see proper in the exercise of their own judgment, to follow the prices of another manufacturer, does not establish any suppression of competition or show any sinister domination."[20] There is no reasonable inference from

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18. J. Markham, "The Nature and Significance of Price Leadership," 41 Am.Econ.Rev. 891 (1951); see also George J. Stigler, "The Kinky Oligopoly Demand Curve and Rigid Prices," 55 J. Pol.Econ. 432, 444-446 (1947).

19. J. Markham, *supra.*, 41 Am. Econ. Rev. at 899.

20. The Third Circuit purported to recognize that a price squeeze attributable to "natural market forces" is not unlawful, but its conclusion that the "squeeze" that purportedly affected Columbia was not such a "market squeeze" was based on defective reasoning. (A-14) Among other things, the Court's statement that

price leadership by a firm, without more, to monopoly power. Indeed, in many industries the price leader is not even the largest firm. Evidence of price leadership alone is economically ambiguous at best.[21]

Columbia's economic expert agreed that Columbia's price squeeze contention required something more than price leadership: it required dominance in a raw material market. (Court of Appeals appendix at 590a-92a). The expert was permitted to assume, subject to "later connection," that Kaiser was "dominant in a market for aluminum coil." (Court of Appeals appendix at 622a). Columbia's counsel initially acknowledged Columbia's burden to prove (a) the existence of a relevant raw material product market, (b) a relevant raw material geographic market, and (c) Kaiser's alleged "domination" of it by something more than evidence of some loose kind of "price leadership." But Columbia never supplied the promised "connection," and the Third Circuit's ruling relieved it of the obligation to do so.

B. Price Leadership Is Economically Meaningless Without a Definition of a Relevant Market.

In abandoning the normal requirement of proof of monopoly power, and permitting price leadership as a surrogate, the Third Circuit also lost sight of the initial necessity for definition of a relevant market as a context for assessing power within that market. Just as a finding of monopoly power is dependent on definition of a relevant market, the antitrust significance of price leadership can only be determined by reference to a relevant market. The Third Circuit's decision conflicts with controlling authority uniformly holding that proof of monop-

NOTE 20 *(Continued)*
Kaiser's raw material price increase was "not related to costs" entirely overlooked the fact that a price increase may reflect a normal competitive response to increased demand, quite apart from any increase in costs. (A-18).

21. J. Markham, *supra*, 41 Am. Econ. Rev. at 896.

oly power, *i.e.*, the power to control prices, first requires proof of both a relevant product market and a relevant geographic market. *See, United States* v. *Grinnell Corp.*, 384 U.S. 563 (1966); *United States* v. *E. I. duPont de Nemours and Co.*, 351 U.S. 377, 391 (1956).

The Third Circuit's decision conflicts with these established precedents. Although it acknowledged that the "plaintiffs' evidence of Kaiser's control over the prices of the raw material, aluminum coil, is more problematic," and noted that "Kaiser was not the largest supplier of aluminum coil or sheet to independent fabricators," the Third Circuit nonetheless adopted Columbia's theory "that Kaiser was a price leader, and that Reynolds and Alcoa, the other major aluminum producers, usually followed Kaiser's pricing strategy." (A-15). It reasoned that since Kaiser "sold over 80 percent of the aluminum *pipe* in the country" (A-16), and since Kaiser used its own coil in its pipe, it would be "most likely" that Kaiser set the pricing policies for aluminum coil. (A-16). But Columbia adduced no evidence during the trial, and the Court cited none, that aluminum coil sold to culvert pipe fabricators constituted the relevant product market, and no evidence that "the country" constituted a relevant geographic market. What evidence there is points to a broad market, not one limited to coil sold to culvert fabricators. The vast bulk of Kaiser's output of the coil of the same alloy as culvert coil is for cans and other uses. For example, Kaiser produced 250 million pounds of can coil, but only 25 million pounds of culvert coil annually. (Court of Appeals appendix, 2374a-76a).

Judge Adams in the first appeal held that Columbia had failed to sustain its burden of showing a relevant raw material market. He said (A-147):

> "Here, no evidence was adduced to show whether the output of the facilities which produced the aluminum sheet and coil for the culvert industry could be or was used to manufacture material sold

only to fabricators of aluminum culvert pipe. Since this is so, there was insufficient evidence to demonstrate whether aluminum sold to culvert manufacturers, or some much larger market constituted the relevant line of commerce."

Since the same price was published for coil of the same alloy, regardless of the finished product market into which it was sold, it was most unlikely that Kaiser would be the price leader. The Court's analysis is seriously flawed because it dispensed with relevant market criteria. Price leadership has no significance except in the context of a definition of relevant product and geographic markets.

C. Price Leadership Cannot Be Proven by Uncontradicted Evidence Showing Substantial Differences in Competitors' Raw Material Prices and in the Timing of Their Price Changes.

Even if it were deemed appropriate, moreover, to apply Section 2 to some "price squeezes" involving "price leadership" by a non-monopoly firm, the threshold condition for finding illegality should be clear proof that defendant's competitors in fact followed defendant's prices to independent fabricators. The Third Circuit's opinion requires none. The only actual price data in this case, which the plaintiff itself put in the record, negate price leadership.

Columbia put into evidence each price change for aluminum coil during the period 1969 through 1978 by Kaiser, Alcoa and Reynolds. During the period of the alleged price squeeze beginning in 1974, the uncontradicted evidence showed that Kaiser changed its coil prices a total of 16 times. Not once did Alcoa follow. Reynolds published a similar price only once. Columbia's own expert conceded in guarded fashion that it "would be difficult to establish [price leadership] from this chart

alone." (Court of Appeals appendix, 699a). But the chart was Columbia's only evidence of coil prices.

Moreover, Columbia's price evidence showed no price similarity for coil among Alcoa, Reynolds and Kaiser during the period of the alleged price squeeze. Alcoa's coil prices were significantly lower than Kaiser's. According to Columbia's chart, the disparity between Alcoa's and Kaiser's coil prices was normally in the range of 3 to 6 cents per pound, and often as much as 10 cents per pound. Columbia introduced evidence that one-half of one cent per pound was a significant and substantial difference in the price for coil. Thus, during the entire period of the alleged price squeeze beginning in January of 1974, Kaiser's prices were substantially different and were higher than the prices published and quoted by Alcoa, who was Columbia's sole supplier of coil during the period of the alleged price squeeze.

Although the Third Circuit correctly observed that "Columbia's pricing evidence was susceptible of an inference inconsistent with price leadership," (A-17) it erroneously held that it was sufficient to form the foundation for the Court's price squeeze holding.

It is of vital importance that this Court grant certiorari and reverse the erroneous Third Circuit price leadership ruling.[22]

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22. With the price-squeeze claim removed, there is no basis left for Columbia's Sherman Act §2 claim. With respect to the four remaining acts alleged to establish a violation:

1. The district court, in a ruling not contested by respondents on appeal, dismissed the claim regarding Kaiser's persuading Columbia to install a particular pipe-making machine.
2. Kaiser's alleged refusal to deal with Columbia obviously caused no harm because Columbia had other and cheaper sources of supply. Moreover, the dismissal of plaintiffs' Clayton Act §3 claim removed the basis for a contention that Kaiser's effort to obtain a requirements contract from Columbia was unlawful.
3. Kaiser's location of a pipe fabricating plant in Columbia's territory was a legitimate response to Columbia's turning to

CONCLUSION

For the foregoing reasons the petition for a writ of certiorari should be granted to limit the *Alcoa* "price squeeze" doctrine to monopolists of the raw material or at least to require clear proof of monopolistic price leadership. In the course of review, the Court may wish to examine the soundness of the *Alcoa* price squeeze doctrine as formulated by Judge Hand.

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other coil suppliers, which deprived Kaiser of an outlet for its coil in the geographic market concerned.

4. Kaiser's appointment of Kennedy, Columbia's former salesman, as an independent distributor of Kaiser-manufactured pipe could in no way suffice to establish a Section 2 violation e ·en if, as claimed by Columbia, Kennedy was a credit risk.